IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.26 OF 2006

Sunil Balkrishna Lakhotia .. Appellant

Vs.

Smt.Pratima S. Lakhotia & Ors. .. Respondents

AND

FAMILY COURT APPEAL NO.67 OF 2007

Balkrishna Ramdhar Lakhotia .. Appellant

Vs.

Smt.Pratima S. Lakhotia & Anr. .. Respondents

Mr.A.V.Anturkar i/b Smt.Vinita V.Bakre – Shastry for the appellant in F.C.A. No.26 of 2006

Mr.D.H.Mehta with Mr.K.K.Tated, Ms.Sunanda Kumbhat and Ms.Matesha Jain for the appellant in F.C.A.No.67 of 2007 and respondent no.2 in F.C.A. No.26 of 2006

Smt.Pratima Lakhotia respondent in person in both the matters

CORAM : J.N.PATEL &
A.A.SAYED, JJ.

JUDGMENT RESERVED ON : 20TH SEPTEMBER, 2007
JUDGMENT PRONOUNCED ON : 29TH NOVEMBER, 2007

JUDGMENT (PER J.N.PATEL, J):

1. Heard the learned counsel for the appellants and respondent no.1 in person.

2. Family Court Appeal No.26 of 2006 is filed by Mr.Sunil Lakhotia (husband) aggrieved by the judgment and order dated 6th July 2005 passed by the Judge of the Family Court No.3, Bandra, Mumbai in Petition No.A-179 of 2002 filed by the respondent wife wherein the court granted decree of divorce in favour of the wife under section 13(1)(ia) and 13(1)(v) of the Hindu Marriage Act, 1955 and also granted permanent alimony in the sum of Rs.15,000/- per month towards maintenance of the respondent wife and a sum of Rs.10,000/- per month towards maintenance of the two minor children from the date of the order dated 6th July, 2005. It also granted permanent custody of the two minor children Dhruv and Devang in favour of the petitioner i.e. the respondent wife. In addition to the aforesaid relief, the order of permanent injunction came to be passed against the appellant husband from disposing, selling or creating any third party interest in the

properties i.e. 1/A Terrace flat at Saraf Apartments, Rani Sati Marg, Malad (East), Mumbai and commercial premises at Gambhir Industrial Estate, Gala Nos. 101, 102 and 103; 5 acres land at Khopoli and cars viz. Fiat Uno-Maroon colour, Opel Astra-Green colour bearing No.6237, Esteem-Grey colour bearing No.9814 and Accent-Black colour. The appellant husband was further directed to hand over stridhan to the respondent wife and her personal belongings along with that of the children as per the list annexed to the petition and awarded cost of Rs.50,000/-.

3. In view of the fact that the appellant husband avoided execution of decree, the respondent wife initiated execution proceedings against the properties purported to be owned by her husband and standing in the name of her father in law, Balkrishna Ramdhar Lakhotia in various proceedings of execution registered as R.D No.40 and 41 of 2005 and R.D.No.181 and 184 of 2006. The said Balkrishna Ramdhar Lakhotia objected to the execution proceedings by filing an application before the Family Court which

came to be partly allowed by the learned Judge of the Family Court wherein the attachment in respect of Flat No.501, Saraf Apartment, 54, Rani Sati Marg, Malad (East), Mumbai 400 051 was vacated and his claim in respect of other properties was rejected which has led to the filing of Family Court Appeal No.67 of 2007 by the father in law of the petitioner, Balkrishna Ramdhar Lakhotia against Smt.Pratima S. Lakhotia, decree holder. Considering that the proceedings for execution arises out of Judgment and Decree passed against the appellant husband wherein his father filed an objection, both these appeals have been clubbed and taken up for hearing together and are being disposed of by this common judgment and order.

4. Ms.Pratima Lakhotia, the wife of Sunil Lakhotia was required to file the petition against the respondent husband for a decree of divorce under section 13 (1)(ia) and 13 (1)(v) of the Hindu Marriage Act, 1955 on the ground that the said Sunil Lakhotia was suffering from a communicable venereal disease of the nature HIV positive i.e. AIDS.

5. The fact which is not in dispute is that the marriage between Pratima and Sunil took place on 23rd January, 1988 at Ville Parle as per Hindu Vedic Rites. The parties belong to Marvari caste. The wife belongs to Agarwal community whereas the husband is from Maheshwari community. It was the case of the wife that she got acquainted to her husband Sunil prior to her marriage in a function and after 6 years of courtship, they decided to marry. On marriage she realised that Sunil was averse to sex and the marriage could not be consummated. They, therefore, consulted Dr.Kothari who felt that due to certain past incidents he was suffering from mental blockage and on treatment, the marriage was consummated which ultimately resulted in giving birth to two children.

6. It was the case of the petitioner that she was treated with cruelty by her in laws including her husband and in order to demonstrate the same, various instances have been given in the petition. On the other hand, the respondent husband alleged that

she had extra marital affairs with the driver of the school bus as well as other persons and the fact that the husband was suffering from AIDS was detected in the year 1996-97 is not disputed. It is her case that she was required to withdraw from the company of her husband under the fear of contacting AIDS and due to frequent quarrel with her in laws. In the year 1998, Respondent's father in law purchased a separate flat on the first floor in the same building in the respondent's name. She took care of her husband and family members but she was isolated and neglected by them. On 24.04.2000, there was a major quarrel and she was assaulted, because of which she was required to leave the matrimonial home along with her children and lodged a report (N.C.bearing no.2006 / 2000) in Dindoshi Police Station. For about three weeks, she stayed with her parents. Thereafter, family Physician, Dr.Sharma mediated in between and requested her to come back as her husband's health had deteriorated and that if it did not improve he would not live for long time and she was assured that she would not be harassed because of which she returned to the matrimonial home on 15.05.2000.

7. It was her case that her brother-in-law as well her father-in-law made sexual advances towards her which she did not entertain. It is on 14.07.2000 that the petitioner was forced to leave her matrimonial home on being assaulted. Her brother came to fetch her followed by her father who came alongwith Sub Inspector and a constable from Dindoshi Police Station. She was permitted to leave with her wearing apparels by obtaining a note from her by the respondents on the condition that she would not claim anything including her stridhan if she wants to take her children and that since then she has been residing in a flat at Malad alongwith her two children which was rented by her father. Thereafter, she has been completely neglected and deserted by her husband and in laws.

8. It was the case of the wife that her husband Sunil lives in a joint family. He runs computer coaching classes and is owner of office premises at Goregaon and earning a sum of Rs.5,00,000/- per month from the said coaching classes and owns a flat at Malad, a bungalow at Lonawala and also owns 5 acres plot of land at

Khopoli and therefore, he can easily pay a sum of Rs.1.0 lac which can be utilised to meet her expenses and that of her children.

9. It was the case of the husband that the petitioner was living an adulterous life and continues to do so and that she has been caught red handed on several occasions for which she apologised but she did not improve. He has denied all the allegations.

10. During the course of the proceedings, respondent wife filed an interim application for maintenance and was granted Rs.10,000/- per month and her two minor children were granted maintenance of Rs.5,000/- each from the date of the application. It appears that during the pendency of the proceedings, the appellant husband failed to appear and contest the matter in order to drag on the litigation and further failed to pay interim maintenance as directed which resulted in the Family Court passing an order on 1st March, 2005 striking off the defence of the husband. The husband thereafter moved an application for recalling the said order which also came to be rejected by the learned Judge of the Family Court

by order dated 20th June, 2005 and the court decided to proceed with the trial. In support of her claim, the wife filed an affidavit which went unchallenged as the husband was not permitted to cross-examine her and contest the petition. This resulted in the learned Judge of the Family Court passing the impugned judgment and order.

11. From the pleadings, the learned Judge arrived at a finding that the wife has proved that the husband has treated her with cruelty and further that he is suffering from communicable venereal disease like AIDS and granted decree of divorce in favour of the wife. It also held that the wife is entitled for the custody of the two minor children Dhruv and Devang and that they are entitled for maintenance i.e. wife @ Rs.15,000/- per month and the children @ Rs.10,000/- each per month from the date of the order. It also held that she is entitled for stridhan and personal belongings and that of the children as per the list annexed to the petition and awarded cost of Rs.50,000/-.

12. The learned counsel for the appellant husband Mr.Anturkar submitted that the order passed by the Family Court striking off the defence of the husband for failure on his part to pay maintenance is not just and proper. It is submitted that inspite of the fact that the appellant husband moved an application for recalling the said order, no fair opportunity was given to him to cross-examine the respondent wife or lead evidence, thereby, depriving him of his right to contest the petition and the judgment and decree being ex-parte, the relief sought for by the respondent wife is based on unchallenged evidence. It is submitted that the learned Family Court also granted an injunction in favour of the wife in respect of the properties which do not belong to the appellant husband and therefore, he submits to the court that rather than assailing the judgment and decree on merits, it will be proper that this court remands the matter to the Family Court for a fresh trial from the stage of filing affidavit by the wife as evidence by permitting the respondent to participate in the proceedings.

13. Mr.Anturkar, the learned Sr.Advocate for the appellants

further submitted that as on the date, the appellant husband is not in arrears for maintenance and that he undertakes to the court to pay maintenance as awarded by the Family Court without default till the petition is finally decided on merits and in addition to the costs awarded by the Family Court, he is prepared to compensate the respondent wife by paying appropriate cost as deemed fit and proper by this court which would sub serve the ends of justice.

14. On the other hand, Mr.Mehta the learned counsel for the appellant, Mr.Balkrishna Ramdhar Lakhotia submitted that the learned Judge of the Family court ignored the well settled principles of law that as and when a person objects to the execution of decree, the executing court ought to have examined the merits of the matter rather than proceeding with the execution. It is submitted that there is nothing to show that the properties which have been attached by the Family Court belong to the judgment debtor ie. the husband. It factually belongs to the father and as there was resistance / obstruction to the execution of the decree by the appellant by way of attachment on his property, he ought to

have been heard in the matter and, therefore, the Family Court while executing the decree having deprived the appellant of an opportunity of being heard, it has resulted in miscarriage of justice and at least the impugned order deserves to be quashed and set aside. The Family Court should be directed to decide the question regarding right, title and interest of the appellant in the property rather than proceeding to hold that the property belongs to the husband. Therefore, the impugned judgment and order deserves to be quashed and set aside.

15. The respondent in both the appeals is common. She appears in person. She has made a grievance before this court that she has been litigating in the matter since the year 2002 and after facing undue hardship and agony for all these years if the matter is remanded back to the trial court, it would cause great injustice to her and her children. It is submitted by her that the Family Court was justified in striking off the defence of the respondent husband for his failure to comply with the interim order of the court to pay maintenance and that the impugned order was passed is well within the Jurisdiction of the Family Court which

found that the appellant husband has been unnecessarily delaying the proceeding by remaining absent on one pretext or the other and failed to pay interim maintenance as directed by the Family Court. It is submitted by her that the property belonging to her husband which has been specified by her in her petition is being alienated by transferring it in favour of her father in law with the sole object of depriving her of her right to maintenance and that of her children and children's right to succeed the property of their father. The respondent wife submitted that in view of the fact that the appellant husband is suffering from AIDS and his life span is short and taking into consideration his conduct and conduct of his family members, her claim for permanent alimony and her children's claim for maintenance and inheritance would be deprived for ever. It is submitted by her that the Family Court was justified in passing an order of perpetual injunction restraining her husband as well as her father in law from alienating the property which rightly belonged to her husband and was her matrimonial home as well as her children have claim over it. It is submitted that the nature of allegations made by her husband in his reply itself goes to show

the attitude of her husband and his family members, accusing her of adultery without any proof itself amounts to cruelty apart from she being mentally and physically tortured by her husband and in laws. It is submitted by her that she has made the allegations against her brother in law and father in law with all seriousness and within four corners of the house and except for examining herself what best evidence she could give in the matter. Therefore, the judgment and order passed by the Family Court granting decree of divorce and maintenance does not call for any interference. It is further submitted that the appellants have retained her stridhan, the valuation of which runs into lacs of rupees and that she was coerced to give a note in favour of the respondents in order to secure her children who are minor and dependent on her and that their welfare is not safe in the hands of the respondents.

16. In so far as the appeal preferred by the father in law is concerned, it is submitted that during the pendency of the litigation and considering the fact that her husband is suffering from AIDS, her father in law obtained benami documents from his son

conveying the property belonging to his son, Sunil Lakhotia in his name which makes a strong case in her favour and therefore, the learned Judge of the Family Court was right in rejecting the claim of the father in law and permitting her to proceed with the execution without which she would not have been able to recover her maintenance and secure the property belonging to her husband for her children.

17. During the pendency of the appeals, different benches of the court tried to bring about a reconciliation between the parties. This bench itself held 5 to 6 sittings in Chamber alongwith the parties and their learned Advocates to resolve the matter but unfortunately it could not materialise. In so far as the judgment and order of the Family Court and the petition filed by the wife for divorce is concerned, there is no issue over the matter that it was exparte for failure on the part of the husband to abide by the interim order passed by the Family Court in payment of maintenance and the Family Court was right in exercising its Jurisdiction under Order 39 Rule 11 of the Civil Procedure Code in

striking off the defence of the husband, as inspite of repeated opportunities being given to the husband, he not only failed to pay the interim maintenance regularly but also prolonged the trial by remaining absent. An attempt was also made to recall the order but the Family Court as can be seen from the impugned order below Ex.55 that the husband has not only expressed his inability to comply with the order of maintenance but also prolonged the trial.

18. We are aware of the fact that it is only in exceptional cases that the court should accede to the order of remand and one such exception can be that if the court finds that the judgment under appeal has not disposed of the case satisfactorily in the manner it is required to be done. It appears from the record that initially when the interim order to pay maintenance came to be passed, the health condition of the appellant husband who is supposed to be suffering from AIDS was deteriorating and huge amounts of money was required for his treatment, that by itself does not mean that the wife and children were not entitled for maintenance but probably, the husband had no sufficient income left and was at the mercy of his father and relatives.

19. What we find is that this had resulted in depriving the husband of his valuable right to defend the case particularly when he has made amends by paying all arrears of maintenance due and payable under the judgment and decree. Though it is true that this was possible only after the wife was required to repeatedly initiate the execution proceedings and attach the properties of the husband

which is now claimed by the appellant father in law to be his and the same came to be attached by the executing court with the father in law approaching this court by preferring the appeal.

20. As regards the first ground on which we find that the matter deserves to be remanded is in respect of the relief sought for by the petitioner and what has been granted by the Family Court. The petitioner has sought her right to reside in the matrimonial house by claiming that she is entitled for three bed room flat for her residence apart from maintenance and secure future for her children.

21. The Family Court probably, as the matter was not contested, overlooked the fact that the couple were last residing in the matrimonial home i.e. A terrace flat at Saraf Apartments, Rani Sati Marg, Malad (East), Mumbai which was the matrimonial home and stood in the name of her husband Sunil Lakhotia. In addition to that, the appellant at the relevant time, owned commercial premises at Gambhir Industrial Estate and 5 acres of land at Khopoli and

about four motor cars which during pendency of the litigation purported to have been sold to the father by the appellant husband.

22. The Family Court rather than determining as to whether that was the matrimonial house and what were the rights of the respondent wife vis-a-vis the matrimonial house, merely granted an injunction restraining the appellant husband from alienating the property in any manner.

23. As this issue has not been addressed by the Family Court, in our opinion, it has caused prejudice to the respondent wife as her claim for providing her with accommodation and her right to reside in the matrimonial house has not been dealt with and the nature of injunction awarded, does not confer any such right on her, at the most it may secure her claim for maintenance.

24. The other ground is that during the pendency of the two appeals, the appellant husband as claimed by her father in law has paid all arrears of maintenance and is prepared to give an

undertaking to this court that in case the matter is remanded to the Trial Court, they shall regularly pay the maintenance granted by the Family Court to the petitioner and her children till the petition before the Family Court is decided on merits alongwith costs and is also prepared to compensate her by paying appropriate cost as may be ordered by this court.

25. This, in our view, does not cause any prejudice to the respondent wife if the matter is remanded to the Family Court with a direction to permit the appellant husband to participate in the proceeding from the stage the impugned order striking off his defence came to be passed and also decide the issue of entitlement of the respondent wife for providing her suitable accommodation as claimed by her in addition to the maintenance awarded if the Family Court comes to the conclusion that she is entitled for the same on conclusion of the evidence.

26. We therefore, allow the Family Court Appeal No.26 of 2006 by quashing and setting aside the impugned judgment and decree

on the condition that the appellant Sunil Lakhotia and his father file a joint undertaking in this court that they would pay the maintenance as ordered by the Family Court under the impugned judgment and decree and continue to pay the same regularly till the Family Court decides the matter on merits and would also pay the cost of Rs.50,000/- awarded by the Family Court and additional sum of Rs.25,000/- as cost to compensate the respondent wife towards the expenses incurred by her in litigating the appeal in this court within a period of 4 weeks from the date of pronouncement of the judgment and order. In case of breach of aforesaid undertaking, in addition to this court initiating action against the appellants, Sunil Lakhotia and Balkrishna Lakhotia by exercising Jurisdiction under Article 215 of the Constitution of India and Contempt of Courts Act, the defence of Sunil Lakhotia would stand struck off without any further reference to this court.

27. This court expects the Family Court to dispose of the petition filed by the respondent wife as expeditiously as possible within a period of 6 months subject to the condition that the parties

to the litigation would extend all possible co-operation which does not in any manner impinge upon the right of the Family Court to pass appropriate orders if it finds that any of the parties to the litigation have failed to comply with any orders passed or are seeking unnecessary adjournments so as to prolong the litigation. Further, it is made clear that if the parties fail to cooperate with the learned Judge of the Family Court for expeditious disposal of the petition as directed by this court, the learned Judge of the Family Court may proceed exparte and may also report the matter to this court and this court would pass appropriate orders after giving notice to the parties, if so required in the facts and circumstances of the case.

28. In view of the fact that this court has quashed and set aside the impugned order which is the subject matter of the Family Court Appeal No.26 of 2006, Family Court Appeal No.67 of 2007 preferred by Balkrishna Ramdhar Lakhotia, father in law of the respondent , Pratima Lakhotia is disposed of as infructous. The parties are directed to appear before the Family Court on 10th

January, 2008. Registrar Judicial to transmit copy of this judgment and order alongwith record and proceedings to the Family Court on or before 20th December, 2007.

(J.N. PATEL, J)

(A.A. SAYED, J)